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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1275.

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINIONS BELOW.

The opinion of the Court of Appeals now is reported at 570 F. 2d 72, 1977 Trade Cases ¶ 61,725. The decision of the District Court is reported at 418 F. Supp. 1009.

QUESTION PRESENTED.

Did the United States Court of Appeals for the Third Circuit err in holding on the basis of the record in this case that a Chrysler "dealer enterprise" program which is used to finance the creation of new automotive dealerships where a private investor cannot be found and which permits the dealership manager to "buy out" Chrysler's interest in the dealership enhances competition and does not violate § 1 of the Sherman Act, 15 U. S. C. § 1.

STATEMENT OF THE CASE.

A. Proceedings Below.

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit reversing a judgment in a civil antitrust action. The petitioner, Martin B. Glauser Dodge Co. ["Glauser Dodge" or "Glauser"], a former automobile dealership located in Vineland, New Jersey, initiated the action against Chrysler Corporation ["Chrysler Corporation"], three of its wholly-owned subsidiaries—Chrysler Motors Corporation ["Chrysler Motors"], Chrysler Realty Corporation ["Chrysler Realty"], and Chrysler Financial Corporation ["Chrysler Financial"]—and Chrysler Credit Corporation ["Chrysler Credit"], a subsidiary of Chrysler Financial Corporation. For brevity this response will refer to the defendants collectively as "Chrysler".

The Glauser complaint initially included claims of monopolization and discrimination under the Sherman and Robinson Patman Acts. Glauser eventually abandoned these claims with prejudice, submitting its case to the jury solely under § 1 of the Sherman Act, 15 U. S. C. § 1. The jury returned a verdict against Chrysler in the amount of $1,300,000, trebled by the Court to $3,900,000. Chrysler's timely post-trial motions were denied by the District Court.[1] In January, 1977, the District Court entered an order increasing the judgment by attorney's fees and costs in the amount of $650,000. The Chrysler defendants appealed and on November 14, 1977, the Court of Appeals reversed the decision below and directed entry of judgment N. O. V. on the ground that the "dealer enterprise" program was not an unreasonable restraint of trade on this record. *Martin B. Glauser Dodge Co. v. Chrysler Corporation*, 570 F. 2d 72, 1977 Trade Cases ¶ 61,725 (3d Cir. 1977). Glauser's petition for rehearing was denied on December 14, 1977.

1. The Court ordered a minor remittitur, reducing the trebled judgment to approximately $3,700,000.

The petitioner is simply incorrect in its assertion that the Court of Appeals found no errors warranting a new trial.[2] It seems clear from the court's opinion that it never reached Chrysler's claims in this respect since it found that the Chrysler defendants were entitled to judgment N. O. V.

B. The Dealer Enterprise Program.

The record below is lengthy and the parties differ on the inferences and conclusions to be drawn from it. Glauser has set forth its view of the facts extensively in its petition. The contentions of the parties concerning the record are set forth in detail in their briefs before the trial court. These are reproduced in Volume 32 of the Appendix below, A6429-6802. A detailed reply to Glauser's claims concerning the asserted "conspiracies" and "discriminations" would be more appropriate to a brief on the merits than to a response to plaintiff's petition. A short

2. The petition is also incorrect in its assertion that what it terms the "far-fetched" theories of the Court of Appeals were not argued by Chrysler. See the petition at pages 37, 24. Throughout, Chrysler urged that the dealer enterprise program was not a method of forward integration, that it was pro-competitive, and that there was no evidence to support a finding that any Chrysler defendant intended to destroy Glauser Dodge or, indeed, that any action of the dealer enterprise dealerships had had that effect. Chrysler argued the points both before the trial court [see e.g., the Appendix below at A3438-50, A6488-99, A6515-30 and A6578-6604] and in the Court of Appeals [see e.g., Chrysler's main brief at pp. 7-9, 35-43, Chrysler's reply brief at pp. 6-12, 18-22, and Chrysler's supplemental brief at pp. 10-14].

description of the central facts seems more useful in the context of this petition.[3]

As the Court of Appeals noted, the manufacture of automobiles is a capital intensive industry. Historically, the industry has preferred to place its investment into manufacturing facilities, leaving the distribution of automobiles primarily to independently financed dealers. In a real sense, this leaves the manufacturer dependent for its sales on the coverage and success of its dealer network, and this is particularly true of Chrysler. If an independent investor cannot be found to open a dealership in an "open point" in the network—that is, a location where a dealership is needed, but is absent—then the sales in that area will be lost unless the manufacturer itself helps to finance the creation of a new dealership.[4] Accordingly, Chrysler

3. The so-called "discriminations" are described at App. A45-6. Item "A" represented an attack on the dealer enterprise program itself. Claims "B", "E" and "F" were denied and were met by showing that Glauser had been treated no differently than the dealer enterprise dealerships. On this record, "C" represented a claim that the dealer enterprise dealerships should have charged less competitive prices. See footnote 8, *infra*. As to Claim "D", Chrysler Credit established that "without recourse" financing was offered to the Camden area dealerships because it was available from other competitive sources in the immediate Philadelphia area, a position supported by documentation. Claim "G" faced uncontested evidence in Glauser's case that the dealer enterprise dealerships had paid rents equivalent to those charged by independent real estate owners. The charge permitted the jury to find against Chrysler if any claim were accepted (App. A48).

4. This is well illustrated by the evidence in this case. The Glauser dealership closed in July of 1970. Chrysler performed an audit of the sales invoices of Black Horse Dodge and Cherry Hill Dodge (the two DE dealerships nearest to Vineland) for the 18 month period immediately following the closing of Glauser dealership. This showed that the two dealerships sold only 20 vehicles during the 18 months (out of a total of 4351) to purchasers in Cumberland County where Glauser had made a majority of its sales. Since Dodge did not have a dealership in the Vineland area, most of the potential Dodge sales were simply lost.

has been forced to enter into the retail business through its "dealer enterprise" ("DE") program, for the only alternative is the loss of large markets by default. The Court of Appeals' discussion of this history and of Chrysler's need to strengthen its dealership network when its viability as an automobile manufacturer was threatened is found at App. A36-41.

Dealer enterprise dealerships are not utilized when a private individual can be found to open his own dealership. It simply is not in Chrysler's own interest to use its limited capital to invest in a dealership when other funds are available. But where a private investor cannot be found, Chrysler may be able to locate a manager who has ability, form a dealership corporation with the dealership manager as its president, and invest the capital—sometimes jointly with the dealership manager—needed to fund a new dealership. The dealership manager holds contractual rights to buy out Chrysler's interest in the dealership (App. A40-1). While the dealership manager controls day-to-day operations and sets prices, Chrysler retains majority control at the shareholder and board of director levels until the investment is bought out by the manager. If the dealership is unsuccessful, it is closed or sold. Profitable dealerships are bought out by the dealership manager (App. A40, A42-3).

C. Glauser and the Camden Area Dealerships.

The petitioner, Glauser Dodge, was a Dodge dealership located in Vineland, southern New Jersey. The dealership sold about 400 new automobiles per year, but it was either unprofitable or not very profitable.[5] Glauser

5. Glauser's operating statements, submitted to Chrysler, showed profits which averaged about $25,000 per year over the period 1964 to 1969. Its tax returns indicated that it lost money, as did its books which showed a deficit in the retained earnings account over the life of the corporation.

Dodge built a large new facility in 1968-1969 and ran into financial difficulties. By the fall of 1969, Chrysler Credit, which had been financing Glauser's inventory, ascertained that Glauser Dodge had overdrawn its bank account. In February, 1970, Chrysler Credit found that Glauser had sold a number of vehicles "out of trust," which means that it had sold vehicles and retained the proceeds without paying Chrysler Credit the sums borrowed by Glauser to finance the purchase of the same vehicles. In March of 1970, after discovering that Glauser had become involved in a check-kiting scheme (Appendix below at A1482-3, A1859-60), Chrysler Credit placed restrictions on Glauser's credit. In July of 1970 when the dealership was not able to pay its debts, Chrysler Credit repossessed Glauser's inventory and the dealership closed.

There were no dealer enterprise dealerships in or around Vineland, but there were four such dealerships located in the Camden area, 30 to 45 miles from Glauser's location (App. A42-3). One of these dealerships, Crescent Dodge, was unsuccessful and was closed in 1967. The other three dealerships, Cinnaminson Dodge (1970), Cherry Hill Dodge (1972)[6] and Black Horse Dodge (1974) were bought out by their respective dealership managers on the dates indicated in the parentheses, and became privately owned. The effect was to reinstate Dodge as a competitive factor in the Camden area.

Glauser's essential theory at trial was that the dealer enterprise dealerships were "subsidized" by Chrysler and that Glauser Dodge would not have failed absent their competition. Little of Glauser's evidence was directed against Chrysler Corporation itself and none against

6. There is some irony in the fact that Martin B. Glauser himself was the manager of Cherry Hill Dodge before his death in late 1966, a period during which Glauser complains of competition from that dealership. Petition at p. 15.

Chrysler Financial. Instead, most of Glauser's attacks were directed against Chrysler Motors, a sales subsidiary which then operated the dealer enterprise program, Chrysler Realty, a subsidiary which leased dealership facilities to dealers—both independently owned and dealer enterprise dealerships—and Chrysler Credit, a subsidiary of Chrysler Financial which made wholesale and retail financing available to Chrysler dealerships of all types.

At its core, Glauser's case was premised on the argument that DE dealerships (a) received subsidies in the form of services from Chrysler subsidiaries which were not profitable enough to be viewed as independent profit centers and (b) were enabled to lose money by virtue of Chrysler's investment in the dealerships. For example, Glauser urged that Chrysler Realty was not sufficiently profitable, that this meant that dealerships occupying Chrysler Realty facilities were "subsidized" and that Glauser was entitled to recover, as damages, an equivalent subsidy, which Glauser measured by the mortgage principal payments (and depreciation) which the dealer enterprise dealerships did not have to incur, or by the principal payments made (and depreciation taken) by Glauser with respect to its own facility. In the same vein, Glauser claimed that if Camden area "DE" dealerships lost money in any given year, it was entitled to divide that loss by the number of units sold by the dealerships (to determine a "per unit" subsidy) and to be credited by way of treble damages with an equivalent per unit subsidy on each of the units sold by Glauser.[7] The practical effect of this

7. This approach has the result of permitting a plaintiff to recover increasingly larger damages as the actual impact of competition from a DE dealership decreases. For an example, Dr. Kuehn, Glauser's expert, took the position that because Crescent Dodge "lost" overall an amount which averaged $187.50 per unit during 1964, Glauser Dodge was entitled to recover as a "subsidy" the same $187.50 per unit on each of the 352 units which Glauser sold,

approach is to bar the use of company financed dealerships, for if any losses suffered by a DE dealership must be paid in terms of a "subsidy" to all dealers within a 30-mile radius, then the program becomes financially unsupportable.

D. The Decision of the Court of Appeals.

The opinion of the Court of Appeals describes the dealer enterprise program (App. A36-41) and the history of Glauser Dodge and the Camden area DE dealerships (A42-3), analyzes Glauser's claims (A44-50) and the applicable decisions (A50-57), and concludes (a) that absent forward, vertical integration, the creation of new dealerships is pro-competitive (App. A56) and (b) that the fact that Chrysler provided financing for dealerships organized under the dealer enterprise program "does not under a rule of reason analysis of the facts, bring this case within the reach of Section 1 of the Sherman Act" (App. A60). In reaching these conclusions, the Court of Appeals applied the tenet that the "object of the antitrust laws is the enhancement of competition" and rejected the contention that petitioner was "entitled to be insulated from competition encouraged by a manufacturer" (App. A60).

7. (Cont'd.)

for an untrebled total of $66,000. Had Crescent Dodge been even less successful in 1964 and experienced an operating loss of $250 per unit, Glauser's damages under Dr. Kuehn's theory would increase to $88,000 ($250 × 352 units sold by Glauser). If one were to go further and assume that Glauser itself had been more successful and had sold 500 units during 1964, then its damages would be further increased because it would be entitled to receive 500 "subsidies" rather than only 352, so that its single damages would amount to $250 × 500 or $125,000. Accordingly, under Dr. Kuehn's subsidy theory, damages tend to increase as the DE dealerships are less successful, and that increase is compounded as the plaintiff dealership becomes more successful.

REASONS FOR DENYING THE WRIT.

General Motors began its "Motors Holding" program in 1929, but has made relatively less use of the program in recent years, because of the strength of its dealership body. Chrysler and Ford have had to make use of their dealer enterprise or "dealer development" (Ford's equivalent) programs, and have been involved in legal actions. At some risk of over-simplification, all contain at their core the argument that the company-created dealerships have been better financed and hence better able to spend more money for advertising, and charge lower prices for cars.[8] Four plaintiff's verdicts have produced opinions in the Courts of Appeals.

In *England v. Chrysler Corporation*, 493 F. 2d 269 (9th Cir.), *cert. denied*, 419 U. S. 869 (1974), the District Court granted Chrysler's motion for judgment N. O. V. The Court of Appeals for the Ninth Circuit affirmed, holding that if plaintiff's theory could be sustained on any ground,[9] the plaintiff could recover only if it showed that the competing DE dealerships had been managed with a reckless disregard for profit at the retail level. As the Court of Appeals noted:

> "Under Sunset's theory it is difficult to distinguish healthy from unhealthy competition, and mismanagement of a business from unreasonable, and therefore unlawful management. A business which through aggressive sales tactics intensifies competition is not

8. The claim is not one of below-cost pricing. The pricing contentions of petitioner are set forth on pages 15-16 of its petition. While the description is inaccurate in a number of respects, it illustrates that the claim is that the prices were too low, not that the DE dealerships were selling cars below cost. Petitioner's contentions notwithstanding, there was no evidence that any Chrysler defendant set the prices charged by DE dealerships.

9. The underlying liability question was reserved. See 493 F. 2d at 273.

to be lightly condemned. The competition it creates is not necessarily pernicious even if competitors are 'harmed' since competition is always hard on the contestants. Indeed, that is its benefit." 493 F. 2d at 273.

In *Rea v. Ford Motor Company,* 355 F. Supp. 842 (W. D. Pa. 1973), the District Court held that a jury could find Ford liable if it were to finance the opening of new dealerships at the retail level. The decision was reversed by the Court of Appeals for the Third Circuit on the ground that the lost "subsidy" theory of damages followed by the *Rea* plaintiff (and by Glauser in this case) was improper. *Rea v. Ford Motor Company,* 497 F. 2d 577 (3d Cir.), *cert. denied,* 419 U. S. 868 (1974). However, in *Coleman Motor Co. v. Chrysler Corporation,* 525 F. 2d 1338 (3d Cir. 1975), the court reversed a verdict for plaintiff and remanded the case for retrial under an opinion which could be read as indicating that a jury could find an antitrust violation if competition by a dealer enterprise dealership—clearly pro-competitive at the interbrand level—might have an adverse effect on competition at the intrabrand level. 525 F. 2d 1346-47.

There then existed a possibility of a conflict arising between the *Coleman* decision in the Third Circuit and the decision of the Ninth Circuit in the *England* case. Far from creating any conflict between the circuits, the decision of the Third Circuit in *Glauser* resolves that potential conflict. See App. at A56-7.

The opinion of the Court of Appeals assumes for the purposes of analysis only (App. A50) the existence of a conspiracy and proper identification of the relevant product and geographic markets, and turns then to the question whether Chrysler's conduct represented an unreasonable restraint of trade. After discussing the *Rea, Coleman* and *England* decisions, the opinion reviews

the evidence and concludes that the dealer enterprise program had neither the purpose nor the effect of concentrating Dodge sales at the retail level in the hands of DE dealerships.[10]

> "The undisputed evidence is to the effect that each of the four DE dealerships was intended by Chrysler to become a private capital dealership through the normal operation of the contracts with DE managers. Nor can it be inferred from the record in this case that Chrysler operated the DE dealers in disregard of retail profit. During the period when the Quinn program was in operation, Chrysler franchised Glauser Dodge as a new private venture capital dealer. Of the four DE dealerships complained of, one was terminated when it failed to achieve profitability, two had been converted to private ownership at the time

10. Petitioner claims that forward integration was achieved because "sales by factory controlled dealerships increased from 17% to 36% nationally and from 20% to 42.5% regionally over a seven year period." Petition, p. 2. If the figures are meant to apply to DE dealerships they are simply incorrect. The 36% figure refers not to dealerships in which Chrysler has an interest, but to all dealerships located in any facility owned by Chrysler Realty, including DE dealerships, former DE dealerships, and private capital dealerships which never were a part of the dealer enterprise program. Similarly, DE dealerships never achieved 42.5% of the Dodge sales in southern New Jersey. That figure can be reached only by counting sales of dealerships which had been bought out by the dealership manager and hence were no longer a part of the DE program.

An additional case is now pending before the Third Circuit Court of Appeals. In that case counsel were able to achieve significant stipulations of fact, which show that of the 20 dealerships located in the Philadelphia SMSA which were a part of the dealer enterprise program during any part of the period 1962-1969, nine were bought out by the dealership manager, two were sold to third parties, eight were closed as unsuccessful, and only one remained in DE status as of trial in February, 1977. The District Court's opinion granting Chrysler's motion for judgment N. O. V. is reported as *Elfman Motors, Inc. v. Chrysler Corporation,* 1977 Trade Cases ¶ 61,650 (E. D. Pa. 1977).

of trial, and the fourth was subject to a contract providing for such conversion. Finally there was no evidence from which a jury could have found that Glauser Dodge was a lost sales dealership which under the Quinn program was slated for replacement. The record requires the conclusion that the dealer support program outlined in Exhibits P-7 and P-8 was intended by Chrysler as a temporary and supplemental means of bolstering a defective private dealer network and not as a means for forward vertical integration into automobile distribution." App. A57-58, (footnote omitted).

Against the background of this record, then, the Court of Appeals was faced with a claim that creation of new dealerships was anti-competitive, even absent proof of vertical integration or reckless operation. It concluded that the dealerships had a pro-competitive effect on both interbrand and intrabrand levels.

> "In this case, the evidence was that the subsidy took the form of capital investments, absorption of start-up expenses, and favorable credit arrangements. But plaintiff's theory of injury to competition would be equally applicable to any form of subsidy. Moreover, the effect on competition would be the same if the subsidies of which Glauser Dodge complains came from a source other than Chrysler. For example, if, instead of Chrysler's investments, the four DE dealers had obtained more favorable lines of credit with banks and higher private venture capital investment, their ability to subject the plaintiff to intense price competition would be the same. Elimination of such competition cannot be the object of Section 1 of the Sherman Act. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 45 U. S. L. W. 4138 (U. S. Jan. 25, 1977). Yet all that distinguishes the instant case from that of the hypothetical better-financed private dealer is the source of the financing and the motive—market penetration—of the financing manufacturer. The fact that the source of the subsidy is the manufacturer itself, we conclude, does not under a rule of reason analysis of the facts, bring this case within the reach of Section 1 of the Sherman Act. The object of the antitrust laws is the enhancement of competition, while in essence Glauser Dodge argues that it is entitled to be insulated from competition encouraged by a manufacturer. Absent forward vertical integration whose purpose or actual operation is to concentrate Dodge sales in the hands of the Chrysler-owned dealers, the subsidies have a pro-competitive effect, at both the intrabrand and the interbrand levels." App. A59-60.

Glauser's contention that the opinion below permits a manufacturer to integrate forward into the retail market willy-nilly (petition pp. 25-28) simply misreads the opinion below. Citing *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36 (1977), Chrysler had argued in its supplemental brief that interbrand competition was the chief concern of the antitrust laws (see fn. 19 at 433 U. S. 52), that the DE program was strongly pro-competitive at the interbrand level (since it permitted Chrysler to remain as a viable competitor to Ford and General Motors in areas where dealerships could not be opened without an investment by Chrysler) and that injury to a competitive dealership of the sort discussed in the *Coleman* opinion at 525 F. 2d 1347 could not lead, consistent with *Continental*, to a holding that the dealer enterprise pro-

gram violated § 1 of the Sherman Act. The Court of Appeals rejected that argument (see fn. 20 at App. A52) and preserved the *Coleman* decision, limiting it to cases where the record would support the conclusion that the purpose or effect of factory-owned dealerships is to achieve permanent, vertical integration into the retail market.

Glauser attacks this "purpose or effect" analysis. See, e.g., Petition p. 23.[11] However, it is clear that the Court of Appeals held that the creation of DE dealerships was pro-competitive and used the "purpose or effect" analysis to distinguish the case involving an attempt at vertical integration. Some other antitrust defendant seeking to defend a program designed to promote interbrand competition by achieving permanent forward integration into the retail market might question whether the ruling of the Court of Appeals is consistent with the *Continental T. V.* decision in this respect, but that issue is not present here. What is clear now is that after *Glauser* there is no conflict between Ninth and Third Circuits with respect to the dealer enterprise and similar programs.

The major thrust of the petition is that a Writ of Certioari should be granted (a) because the decision below is, in petitioner's view, incorrect and (b) because the Court of Appeals for the Third Circuit should be disciplined for what Glauser Dodge characterizes as a long-standing aversion to private enforcement of the antitrust laws. That Glauser is disappointed with its loss is understandable, but that is insufficient basis for review by this Court. The decision of the Court of Appeals is not only consistent with the decisions of this Court,[12] but was fore-

11. Any sweeping reading of *United States v. Topco Associates, Inc.*, 405 U. S. 596 (1972), is contraindicated by the *Continental T. V.* decision. See fn. 27 at 433 U. S. 57.

12. Glauser admits that the decisions cited by it at pages 25-28 of its petition arose in different factual and legal contexts. *Id.* p. 28.

shadowed by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977). The Court of Appeals for the Third Circuit there had ruled that where a bowling center was acquired by a "deep pocket" defendant in violation of § 7 of the Clayton Act, 15 U. S. C. § 18, a plaintiff could recover damages which resulted from *lawful* competition if it could establish that the bowling alley would have gone out of business (hence decreasing competition) had it not been acquired. In reversing the decision of the Court of Appeals, Mr. Justice Marshall said:

> "But the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The anti-trust laws, however, were enacted 'for the protection of *competition*, not *competitors*' [citation omitted]. It is inimical to the purposes of these laws to award damages for the type of injury claimed here." 429 U. S. 488 (*emphasis original*)

Brunswick also answers petitioner's contention that the Court of Appeals for the Third Circuit is adverse to private enforcement of the antitrust laws. Indeed, in *Brunswick* this Court concluded that the Court of Appeals had sanctioned a theory of damages which was too favorable to antitrust plaintiffs, and penalized competition. The holding of the Court of Appeals in this case reflects not an aversion to antitrust enforcement, but recognition of the proposition that a program which promotes competition by providing the means to create new dealerships should not be condemned under § 1 of the Sherman Act.

CONCLUSION.

For the reasons stated above, the petition for Certiorari should be denied.

Respectfully submitted,

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